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LEGAL ASPECTS OF IMPLEMENTING A GLOBAL CHEMICAL WEAPONS CONVENTION UNDER DOMESTIC LAWS

by

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①

1 INTRODUCTION

The notion that domestic law must be considered as part of the planning to implement an arms control treaty shows how far the nations of the world have come in their negotiation of such agreements. Increasingly, arms control agreements are more than simply mutual declarations of self interest. Verification provisions have made them instruments that create enforceable law which, as such, must be integrated into the existing legal structure of each State Party.

Nowhere is this more obvious than in the development of international controls over chemical weapons. The Geneva Protocol of 1925¹ required only a single page to ban the use of chemical weapons in wartime. In contrast, the Draft Convention on the Prohibition of Chemical Weapons tabled at the Geneva Conference on Disarmament in 1984 by the United States² was some thirty pages long. The most recent Rolling Text of this draft treaty now exceeds one hundred pages and still requires additional text.³ The vast majority of this material specifies the verification measures and the international agency, to be called the Organization for the Prohibition of Chemical Weapons, that have been deemed necessary to implement the agreement.

1. 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

2. United States Arms Control and Disarmament Agency, Documents on Disarmament 269-99 (1984) [hereinafter Documents on Disarmament].

3. Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament, CD/874 (September 12, 1988) [hereinafter Rolling Text].

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If the global chemical weapons convention being negotiated is supposed to be different because it has teeth,⁴ the American body politic may have to rearrange some of its other organs to accommodate them. In our system, this requires a legal analysis.

This subject will be covered in the remaining four sections. Section 2 offers a brief comment concerning the requirements of United States Senate approval of any treaty. Section 3 considers the constitutional problems that may be created by on-site inspections and monitoring. Several means are suggested in section 4 for mitigating the constitutional problems that are uncovered. Section 5 presents the conclusions. (KR) ←

2 SENATE TREATY CONCURRENCE

The Constitution requires the concurrence of two thirds of those present and voting in the United States Senate before a treaty can be ratified.⁵ Rather than present a civics lesson here, suffice it to say that the major issues in this endeavor can be expected to be political, rather than strictly legal. Of course, if a serious question exists about the constitutionality of a chemical weapons convention, this can be used as a weapon by its opponents.

4. See Address by Vice President Bush to the Conference on Disarmament: Chemical Weapons Convention, April 18, 1984, reprinted in Documents on Disarmament, supra note 2, at 303-04; Tanzman, Constitutionality of Warrantless On-Site Arms Control Inspections in the United States, 13 Yale J. Int'l L. 21, 23-28 (1988).

5. U.S. Const., art. II, § 2, cl. 2.

One development that deserves note is the effect on the ratification process of the dispute in the Senate over President Reagan's 1985 decision announcing a so-called "broad interpretation" of the Anti-Ballistic (ABM) Treaty.⁶ A key element in this disagreement was whether the "negotiating record" of confidential federal government cables, memoranda, etc., which had not been communicated to the Senate during its 1972 debate, could subsequently be relied upon to justify an interpretation of the ABM Treaty that some viewed as an Orwellian reversal of its meaning.⁷

The immediate effect of this struggle was felt during the 1988 debate on the Intermediate Nuclear Forces (INF) Treaty.⁸ Here, the Senate voted in favor of the so-called "Biden Condition," declaring that its understanding of the INF Treaty at the time it concurred in ratification could not later be reinterpreted.⁹ If disputes of this kind between the branches of the federal government remain unresolved, a chemical weapons convention may become hostage to a similar power struggle.

6. See generally S. Rep. No. 164, 100th Cong., 1st Sess. (1987).

7. *Id.* at 2, 48-52.

8. Kellman, Treaty Wars in Washington, Long Island Sunday Newsday, March 27, 1988 (Editorials), at 1, 7.

9. Earle and Koplow, Of Arms Pacts and Ocean Routes: Sofaer Doctrine on Rocks, Legal Times, August 22, 1988, at 14.

3 FOURTH AMENDMENT PROBLEMS OF ON-SITE ARMS CONTROL
INSPECTIONS AND MONITORING

On-site inspections and monitoring are at the heart of the enforcement mechanism of the various chemical weapons convention proposals. Unfortunately, these may conflict with the United States Constitution. The most obvious constitutional problem created by a system of on-site arms control inspections and monitoring is that it might transgress the Fourth Amendment.

The Fourth Amendment to the Constitution has become perhaps the largest shield protecting private citizens against government intrusion. It states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁰

The most often-cited formulation of what the Fourth Amendment covers was written in 1967 by Justice John Marshall Harlan in Katz v. United States:

There is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."¹¹

Other decisions have established that the Fourth Amendment protects private homes and persons, as well as businesses, albeit the latter to a somewhat lesser degree.

10. U.S. Const. amend. IV.

11. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

The general rule is that a valid search warrant, issued by a neutral magistrate upon a showing of "probable cause," is a prerequisite to a constitutionally valid search. Because judges are institutionally independent of law enforcement agencies, this is thought to provide a measure of insulation from unreasonable invasions. Exemptions from the warrant requirement exist, but are not favored by the Supreme Court.¹²

The search process also determines in part its constitutionality. Searches that are limited in scope and clearly defined in advance are more likely to pass constitutional muster than those that are sweeping or sporadic. Governmental violations of the Fourth Amendment may be met either by a court injunction to prevent a search or by an award of monetary damages to compensate losses if an intrusion has already occurred.

It may be too much to expect of the art of 1980's diplomacy that the mechanics of on-site inspections for the entire world would bend to the peculiarly American requirement for a court to issue a warrant before the Organization, at the behest of another State Party, could enter an American business or home to enforce its treaty rights. Indeed, neither the 1984 American Proposal nor the September 1988 Rolling Text provide specifically for warrants for any of the types of on-site inspection they would create, although both may be sufficiently flexible to accommodate warrants for some inspections.

12. See Koplow, Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States, 63 N.Y.U. L. Rev. 229, at 311 n.504.

It seems unwise to assume that nobody would ever resist such an inspection by going to court and demanding an injunction. For example, a private firm might want to protect its trade secrets from disclosure, or to prevent the federal government from discovering that its operation violates other laws, such as environmental requirements. If it could prove that an impending on-site inspection would violate its Fourth Amendment rights, a private business might be able to obtain a court injunction prohibiting the search.¹³ An injunction against an on-site inspection would probably breach a chemical weapons convention resembling either the 1984 American proposal or the September 1988 Rolling Text.

Assuming that such a court fight ensued, it is uncertain whether the Fourth Amendment warrant requirement applies at all to searches involving foreign affairs. The Supreme Court has never ruled on the question, and lower courts have split on the cases that are most closely analogous. On one hand, the interest of Americans in privacy is not inherently reduced because the inspection is by an international organization. On the other, the international sensitivity of on-site verification pursuant to a treaty would create a strong national security interest in compliance. Nobody can predict the outcome of a test case. Therefore, prudence demands a closer look at what might happen if a court decides that the Fourth Amendment applies to on-site arms control inspections.

13. *Id.* at 38-39.

The September 1988 Rolling Text envisions two distinct types of on-site inspections, neither of which are characterized as refusable by the State Party of which inspection is sought: routine systematic international on-site verification inspections of declared facilities under Article VI and challenge inspections under Article IX. Other papers in this symposium explain the purpose and procedures associated with each type of inspection, although it bears repeating here that both articles contain substantial areas where agreement has not yet been reached. The 1984 American proposal differs insofar as its inspection scheme distinguishes challenge inspections at locations or facilities that are less likely to be involved in illicit chemical weapons production by allowing them to be refused.¹⁴

3.1 Routine Systematic International On-Site Verification Inspections

Fourth Amendment concerns are more easily integrated into the routine systematic international on-site verification inspections that are envisioned for declared facilities by Article VI of the Rolling Text than are challenge inspections. It is possible that various provisions in the treaty could be construed to permit American officials to seek warrants prior to such inspections. For example, the Rolling Text requires execution of a separate agreement between each State Party and the Organization to govern the conduct of these verification

14. Tanzman, supra note 4, at 34-35.

inspections pursuant to permitted activities under Article VI. This creates the possibility of accommodating a warrant procedure for searches of American firms.¹⁵ If warrants can be sought under the treaty, an administrative search scheme relying on warrants could be devised that might be constitutional.¹⁶ Such a scheme would entail the development of an orderly and logical plan for all similar facilities and its prior approval by a court.

If an administrative search scheme relying on warrants is inconsistent with Article VI, then the authority to conduct warrantless inspections or monitoring might have to be derived from one of the few recognized exemptions to the normal warrant requirement. Extensively regulated businesses sometimes are subjected to warrantless searches to enforce laws regulating their operations. A line of Supreme Court decisions holds that such "pervasively-regulated industries" can be searched without a warrant, essentially because they are parties to a sort of imputed social contract. In return for society's permission to engage in a business that might otherwise be prohibited altogether, they implicitly agree to warrantless searches as a sort of regulatory cost of doing business.¹⁷ As the Supreme

15. Rolling Text, supra note 3, at 83. But see Tanzman, supra note 4, at 37 n.113 (contradictions between ordinary warrant procedure and 1984 American proposal).

16. See Koplow, supra note 12, at 305-08, 351-53.

17. See, e.g., Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Tanzman, supra note 4, at 44-48.

Court in New York v. Burger recently put it, three criteria must be met:

First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . . Second, the warrantless inspections must be "necessary to further [the] regulatory scheme. . . ." Finally, "the statute's inspection program, in terms of the certainty and regulatory of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."¹⁸

The weapons industry exemplifies the kind of pervasively-regulated industry that would justify warrantless on-site arms control inspections.¹⁹

It is not certain that the same could be said today for the chemical industry. First, although the chemical industry faces federal regulation of environmental, health, and safety concerns, one recent Supreme Court decision implies that it is not pervasively regulated.²⁰ Second, even if the chemical industry is pervasively regulated by environmental, health, and safety laws this does not mean that it has implicitly consented to warrantless searches under a national security treaty. Viewed as an imputed social contract, one might say that there is presently no consideration for implying that the industry has agreed to warrantless searches for this different purpose. Thus, it is questionable whether a court would uphold warrantless routine

18. 107 S. Ct. 2636, 2644 (1987) (citations omitted; brackets in original).

19. See United States v. Biswell, 406 U.S. 311 (1972).

20. Dow Chemical Co. v. United States, 106 S. Ct. 1819, 1825 (1986). Compare Tanzman, supra note 4, at 49-52 with Koplow, supra note 12, at 344-46, 351.

systematic international on-site verification inspections under Article VI were it faced with a resisting chemical company.

3.2 Challenge Inspections

Challenge inspections, as characterized by the Chairman of the Ad Hoc Committee for the 1987 Session and the Chairman of Group C for the 1988 Session,²¹ would be even more constitutionally vulnerable. The purpose of these would be to "clarify doubts about compliance" on the part of a requesting State at any site under the jurisdiction or control of the requested State. Whether triggered by an individual State Party or with the concurrence of the Organization, the concept appears to exclude any outright refusal by the requested State except possibly on the ground that the inspection is outside the objectives of the convention. Allowance appears to be made neither for a showing of objective probable cause nor for review by an independent magistrate of an American court. None of the limitations inherent in the extensive planning for Article VI routine inspections would be present. Read literally, challenge inspections could be open-ended fishing expeditions reaching both businesses and homes. In short, this form of challenge inspections is vested with almost none of the protection from governmental intrusion ordinarily associated with the Fourth Amendment.²²

21. Rolling Text, supra note 3, at 139-42.

22. See Koplow, supra note 12, at 351-53.

4 MITIGATION

Options exist for reducing the friction between the interests of controlling chemical weapons and of protecting privacy under the Fourth Amendment to the United States Constitution, while preserving the general approach to on-site inspections embodied in the 1984 American proposal and the 1988 Rolling Text. These include development of specialized remote monitoring devices, inducing voluntary consent to be inspected, and enactment of a federal statute to extend pervasive regulation over chemical weapons to the chemical industry and to redefine the legal remedies available to the subjects of on-site arms control inspections. This section presents a short explanation of several ideas that might merit further study.

4.1 Remote Monitoring

Remote monitoring, as distinguished from on-site monitoring, is not considered to be a search within the meaning of the Fourth Amendment where it is conducted from a public place and employs generally-available technology, such as aerial photography from public airspace.²³ It offers the opportunity of helping to verify compliance without triggering the need for a search warrant. The development of remote monitors that select only

²³ Tanzman, *supra* note 4, at 56. See Koplou, *supra* note 12, at 341-44.

evidence of violations, while excluding extraneous matter, would be of particular benefit.²⁴

4.2 Consent

Consent from the private site of which inspection is sought often can be obtained. Since constitutional rights can be voluntarily waived, such consent can obviate some of the most difficult constitutional problems. Indeed, the enormous market power of the United States government could be used to induce consent by requiring contractors to agree to on-site arms control inspections as a condition of any future business, just as affirmative action employment policies are encouraged.

4.3 Federal Statutes

One or more federal laws could be enacted to provide alternatives to what might otherwise result from litigation. First, an implementing statute may create a system of pervasive regulation of chemical weapons. Second, a new law redefining the remedies available to the subjects of on-site arms control inspections might overcome many of the problems that cannot be solved by other means.

4.3.1 Pervasive Regulation of Chemical Weapons Production

Passage of a statute might assure that a court would find the declared facilities covered by Article VI to be pervasively

24. Tanzman, *supra* note 4, at 55-58.

regulated, thereby qualifying them for warrantless routine systematic international on-site verification inspections under the Supreme Court criteria quoted above. Certainly, an enormous government interest exists in eliminating chemical weapons. The necessities of international diplomacy appear to dictate that warrantless on-site inspections be an important deterrent to violations. Finally, a regular and certain inspection program is under development in Article VI.

Nevertheless, difficulties might arise. The Supreme Court has never decided a case where it was asked to uphold a scheme of pervasive regulation that is sub generis. However, its opinions in this area look in part to the length of time an industry has been regulated to determine its pervasiveness, although the trend recently has been to downplay this as a factor. While chemical weapons control can be said to date at least from 1925, the convention itself will initiate the first real internal regulatory scheme.

Assuming this problem can be resolved, the need for extensive declarations under Article VI probably would provide a sufficient rationale for warrantless searches of declared facilities. The Rolling Text requires each State Party to disclose to the Technical Secretariat various types of production information about private facilities producing chemical weapons precursors.²⁵ The federal government would have to obtain that information from these firms in order to declare it.

25. See, e.g., Rolling Text, supra note 3, at 79-81.

A statute requiring chemical companies to disclose this information to the federal government would provide the United States what it would need to declare to the Technical Secretariat. Since existing federal laws already require disclosure of similar information to what a chemical weapons convention would require,²⁶ the nature of the information that would be disclosed should not itself present a constitutional problem. The scheme of routine systematic international on-site verification inspections would be justified by the need to double check these declarations.

4.3.2 Redefine Remedies

A statute redefining the remedies available to the subject of an unconstitutional arms control inspection would reduce the possibility that a court would feel compelled to enjoin either routine or challenge inspections. Such a law would not make unconstitutional inspections become constitutional. Rather, since the most important diplomatic concern would be that a court injunction might breach the convention, the object would be to substitute other legal relief.

The Constitution empowers the federal government to enact additional remedies to those that a court might otherwise have

26. See Carpenter, Government Regulation of Chemical Manufacturing in the USA as a Basis for Surveillance of Compliance With the Projected Chemical Weapons Convention, in 5 Stockholm International Peace Research Institute, Chemical and Biological Warfare Studies [The Chemical Industry and the Projected Chemical Weapons Convention], at 11-32 (1986).

available to assist an aggrieved plaintiff, perhaps allowing the government to "buy its way out" of situations that might otherwise result in an injunction. The Federal Tort Claims Act could be expanded to explicitly provide for federal liability for monetary damages from an illegal on-site inspection. A civil claim could be established for treble damages for misuse by any person of any information learned during an on-site arms control inspection, perhaps including inspectors. A reserve fund could be created to permit claims for compensation to be paid out to claimants on an expedited basis. At the same time, application for any injunctive remedy regarding an on-site inspection under the convention could be made to extinguish any claim that might otherwise have existed to these extraordinary damages. Thus, a plaintiff would have a powerful monetary incentive to avoid seeking an injunction at all.

A grant of use immunity for all information uncovered during a consensual on-site arms control inspection would remove a disincentive against allowing inspections to take place. Assuming that one reason a firm might resist an inspection is fear of prosecution for existing environmental, health, or safety laws, use immunity would make such a motive moot. Indeed, since the burden would fall on the federal government to prove that any information used in subsequent prosecution was not a result of the inspection, a positive incentive to consent might be created. Of course, this assumes that the public interest in the convention is thought to be higher than of those other laws.

Furthermore, it might make criminal prosecution for a treaty violation impossible.

The more difficult question is whether these encouragements to allowing on-site inspections can be complemented by a prohibition against injunctions. Ultimately, the Supreme Court would have to answer such a question and it has not yet had to do so. While the Court has indicated that Congress can substitute other remedies for an injunction,²⁷ some commentators have argued strongly to the contrary, contending that the judiciary is constitutionally obligated to select the most appropriate remedy regardless of what Congress might say.²⁸ This view would hold that an injunction to prevent an unconstitutional inspection is a right that cannot be abridged by statute. Thus, even if Congress were inclined to vote to take such an unusual step, it could be beyond Congressional power.

5 CONCLUSIONS

The effects of chemical weapons are potentially so horrendous that extraordinary steps to eliminate them are justified. Some of these steps can be accommodated within the

27. Tanzman, supra note 4, at 64-66. But see United States v. Stanley, 107 S. Ct. 3054, 3068 (1987) (Brennan, J., dissenting) ("Of course, . . . any constitutional violation, may be enjoined if and when discovered.") (emphasis in original).

28. See, e.g., Steinman, Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights, 83 Mich. L. Rev. 269 (1984); Sager, Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 85 (1981).

conventional values established by the United States Constitution. Warrantless on-site inspections of some private sites, however, are problematic. In some cases, conflict may be avoided by careful forethought. For others, a system of incentives and disincentives may be an appropriate legislative solution, but would require further development.